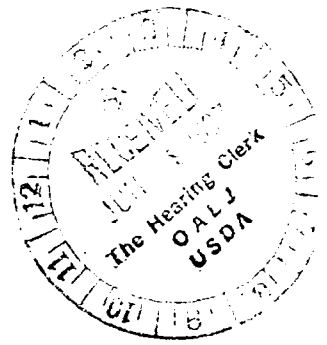


UNITED STATES DEPARTMENT OF AGRICULTURE
BEFORE THE SECRETARY OF AGRICULTURE



A.W. Cherry and Dean Cherry d/b/a)	P. & S. Docket No. R-95-16
A.W. Cherry and Son.)	
)	
Complainant)	
)	
v..)	
)	
Kevin Williams, L.D. "Pokey" Arnold,)	
James Whiten, and James Whiten)	
Livestock, Inc.,)	
)	
Respondents)	Decision and Order

Preliminary Statement

This is a reparation proceeding under the Packers and Stockyards Act, 1921, as amended (7 U.S.C. § 181 et seq.). A formal complaint was filed on February 10, 1995, alleging that complainant sold 114 head of feeder cattle with a total purchase price of \$37,120.61 to respondent Kevin Williams, and then delivered the livestock directly to William's customer, respondent L.D. "Pokey" Arnold. It was further alleged that Arnold did not make payment for the livestock to Williams, who in turn did not pay complainant, because Arnold was an employee of respondent James Whiten, and Williams was indebted to Whiten from previous dealings that did not involve complainant. Finally, the complaint asserts that the cattle were resold and the proceeds received by James Whiten.

Copies of the complaint and the investigation report prepared by Grain Inspection, Packers and Stockyards Administration, which is part of the record filed in this proceeding under the Rules of Practice, were served on the respondents. A copy of the investigation report was served on the complainant. An answer was filed by respondent Kevin Williams alleging that he

had sold on behalf of A.W. Cherry and Son, 114 head of feeder cattle valued at \$34,243.19 to Pokey Arnold, who mis-represented and fraudulently claimed that he was buying on his own account and would make immediate payment for said cattle. This answer further alleged that Arnold was the agent and employee of James Whiten, that Arnold and Whiten knew at all times that Williams had no way of paying for the cattle except from the proceeds of the sale of said cattle; and that Arnold and Whiten designed the transaction for the sole purpose of utilizing Williams as a tool to defraud A.W. Cherry and Son or some other unknown seller of livestock. Separate answers were filed on behalf of respondents James Whiten, James Whiten Livestock, Inc., and L.D. "Pokey" Arnold by attorney Alton M. Adams. The respondents filing these answers denied entering into any agreement for the purchase of 114 head of feeder cattle from A.W. Cherry and Son, admitted that Arnold had purchased the same cattle from Williams as an agent for James Whiten Livestock, Inc., and asserted that full payment for this cattle purchase had been made by setoff of a debt owed by Williams to James Whiten Livestock, Inc. Knowledge that Williams had not paid for the livestock or that complainant had any interest in said livestock was denied. As none of the parties requested an oral hearing, this proceeding was handled pursuant to the alternative written procedure provided for under the Rules of Practice (9 C.F.R. § 202.113). The parties were provided with opportunities to submit evidence and to submit written argument of brief, proposed findings of fact, conclusions, and order. Complainant submitted additional evidence, a statement made under penalty of perjury by complainant's agent and clearee, James P. Gibson, regarding the sale he negotiated with respondent Kevin Williams. Respondents filed no evidence to supplement the evidence included in the investigation report. Respondents James Whiten Livestock, Inc., James Whiten and L.D. "Pokey" Arnold jointly submitted proposed

findings of fact, conclusions of law, and order. A request for an indefinite continuance in the briefing schedule, which was submitted on behalf of respondent Kevin Williams following his temporary confinement to a mental institution, was denied.

Relevant Statutory Provisions

Section 308 of the Packers and Stockyards Act provides that:

(a) If any person subject to this Act violates any of the provisions of this Act, or of any order of the Secretary under this Act, relating to the purchase, sale, or handling of livestock, the purchase or sale of poultry, or relating to any poultry growing arrangement, he shall be liable to the person or persons injured thereby for the full amount of damages sustained in consequence of such violation.

(b) Such liability may be enforced either (1) by complaint to the Secretary as provided in section 309, or (2) by suit in any district court of the United States of competent jurisdiction; but this section shall not in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this Act are in addition to such remedies.

(7 U.S.C. §209)

Section 309 of the Packers and Stockyards Act provides that:

(a) Any person complaining of anything done or omitted to be done by any stockyard owner, market agency, or dealer (hereinafter in this section referred to as the "defendant") in violation of the provisions of sections 304, 305, 306, or 307, or of an order of the Secretary made under this title, may, at any time within ninety days after the cause of action accrues, apply to the Secretary by petition which shall briefly state the facts, whereupon the complaint thus made shall be forwarded by the Secretary to the defendant, who shall be called upon to satisfy the complaint, or to answer it in writing, within a reasonable time to be specified by the Secretary. If the defendant within the time specified makes reparation for the injury alleged to be done he shall be relieved of liability to the complainant only for the particular violation thus complained of. If the defendant does not satisfy the complaint within the time specified, or there appears to be any reasonable ground for investigating the complaint, it shall be the duty of the Secretary to

investigate the matters complained of in such manner and by such means as he deems proper. (emphasis added)

(e) If after hearing on a complaint the Secretary determines that the complainant is entitled to an award of damages, the Secretary shall make an order directing the defendant to pay to the complainant the sum to which he is entitled on or before a day named.

(7 U.S.C. §210)

Section 307 of the Packers and Stockyards Act provides, inter alia, that:

(a) It shall be the duty of every stockyard owner and market agency to establish, observe, and enforce just, reasonable, and nondiscriminatory regulations and practices in respect to the furnishing of stockyard services, and every unjust, unreasonable, or discriminatory regulation or practice is prohibited and declared to be unlawful. (Emphasis added)

(7 U.S.C. §208)

Relevant Substantive Regulation

Section 201.81 of the regulations issued under the Packers and Stockyards Act provides that:

No stockyard owner, packer, market agency, or dealer shall employ any person who has been suspended as a registrant to perform activities in connection with livestock transactions subject to the jurisdiction of the Secretary under the Act during the period of such suspension: *Provided*, That the provisions of this section shall not be construed to prohibit the employment of any person who has been suspended as a registrant until such time as the person demonstrates solvency or obtains the bond required under the Act and regulations. No such person shall be employed, however, until after the expiration of any specified period of suspension contained in the order of suspension. (9 C.F.R. 201.81)

Findings of Fact

1. Complainant A.W. Cherry and Dean Cherry d/b/a A.W. Cherry & Son (hereinafter "complainant"), is a partnership whose business mailing address is P.O. Box 3260, Bowling Green, Kentucky 42102.

2. Complainant is, and at all times material herein was:

(a) Engaged in the business of a dealer buying and selling livestock in commerce and providing clearing services; and

(b) Registered with the Secretary of Agriculture as a dealer buying and selling livestock in commerce and providing clearing services.

3. Respondent Kevin Williams d/b/a 7-K Cattle Company (hereinafter "respondent Williams" or "Williams") is an individual whose business mailing address is P.O. Box 881, Sublette, Kansas 67877.

4. Respondent Williams at all times relevant herein was:

(a) Operating a cattle pre-conditioning feedlot and engaged in the business of a dealer buying and selling livestock in commerce; and

(b) Not registered with the Secretary of Agriculture in any capacity.

5. Respondent L.D. "Pokey" Arnold, a/k/a Lannie D. Arnold (hereinafter "respondent Arnold" or "Arnold"), is an individual whose business mailing address is HC66, Box 121, Foss, Oklahoma 73647.

6. Respondent Arnold is, and at all times material herein was:

(a) Engaged in the business of a dealer buying and selling livestock in commerce for his own account or for the account of others; and

(b) Suspended as a registrant for a period of five years from the effective date of the order of the Secretary of Agriculture issued September 3, 1993, in In re Lannie D. Arnold, Respondent, P. & S. Docket No. D-92-55, which provides, inter alia, that:

Respondent Lannie D. Arnold is suspended as a registrant under the Act for a period of five (5) years, provided that the respondent may be a salaried plus commission employee of Whitten Livestock during the period of this suspension subject to the following condition: that payments are made to Western Iowa Farms Co. in accordance with the attached "Plan of Restitution" which is hereby incorporated into and made a part of this decision.¹ If any payment due under the payment plans described above is made more than 30 days after it is due, the respondent shall be prohibited from salaried employment by a registrant or packer for the remainder of the five-year suspension period.

7. Respondent James Whiten (hereinafter "respondent James Whiten" or "James Whiten") is an individual whose business mailing address is P.O. Box 281, Toccoa, Georgia 30577.

8. Respondent James Whiten is, and at all times material herein was:

(a) President and 100 percent owner of the issued and outstanding stock of respondent James Whiten Livestock, Inc.;

(b) The person who managed the day to day operations of respondent James Whiten Livestock, Inc.; and

(c) A dealer and market agency buying on commission within the meaning of these terms in the Act and subject to the Act.

9. Respondent James Whiten Livestock, Inc. (hereinafter "respondent Whiten Livestock" or "Whiten Livestock") is a Georgia corporation whose business mailing address is P.O. Box 281,

¹Payments totaling \$300,000.00 are scheduled over a eight year period with a balloon payment of \$34,000.00 due at the end of 2002.

Toccoa, Georgia 30577

10. Respondent Whiten Livestock is, and at all times material herein was:

(a) Engaged in the business of a dealer buying and selling livestock in commerce for its own account, a market agency buying on commission, and providing clearing services; and

(b) Registered with the Secretary of Agriculture as a dealer and as a market agency buying on commission and providing clearing services.

11. On July 25, 1993, respondent Whiten Livestock sold 82 head of steers and bulls with a total purchase amount of \$39,943.30 to respondent Williams, who paid for this livestock with check no. 1192 in the amount of \$39,943.30 on July 31, 1993. This check, which was drawn on the account of "Seven K Cattle Co. Kevin or Velma Williams," was returned for insufficient funds and never made good (Investigation Exhibits K, N and O).

12. Respondent James Whiten put money into Whiten Livestock to cover this bad debt and sent the insufficient funds check to Donald A. Frigon, an attorney in Dodge City, Kansas for collection. However, nothing was collected. (Investigation Exhibit K)

13. In November of 1994, respondent James Whiten saw an ad that respondent Williams had placed in the High Plains Journal which listed cattle for sale. A similar ad which respondent Williams ran in the January 2, 1995 issue of the High Plains Journal reads as follows:

7K CATTLE COMPANY
Custom Preconditioned
& Backgrounding
Cattle Received This Week:
500# Heifers, \$73; Steers \$76
400# Heifers, \$76; Steers \$84
500# Lim. Hfrs., \$80; Steers \$83
Sublette, KS PH-316-675-2682
43-29-02-71-0051

(Investigation Report. Exhibits K and M)

14. Respondent James Whiten contacted respondent Arnold in Foss, Oklahoma, and had him order a load of cattle from Williams. Arnold had been living in Wartrace, Tennessee, and had been employed by, or otherwise engaged in business with, Whiten Livestock when the order suspending Arnold as a registrant was issued in P. & S. Docket No. D-92-55². During a prompt payment review conducted at the premises of Whiten Livestock on March 8, 1995, it was determined that Arnold had moved to Foss, Oklahoma in 1994, and that he was buying cattle from other dealers at stockyards in Oklahoma, Texas, and Missouri in purchases which were paid for by Whiten Livestock. When cattle were sold by Arnold, he issued Arnold Cattle Co. invoices which directed payment to Whiten Livestock. Supervisory Marketing Specialist John D. Barthel discovered that no salary was being paid to Arnold by Whiten Livestock, that Arnold Cattle Co. invoices were issued in some transactions, and that records of the business with Arnold were not being kept by Whiten Livestock. (Investigation Exhibits D, E and L)

15. Respondent Arnold has acknowledged in his affidavit of May 4, 1995, that he was instructed by James Whiten to find the best buy on 300# to 500# heifers that were to be ordered from Kevin Williams, Sublette, Kansas. He was told that James Whiten intended to pay Williams for the cattle with an NSF check that Whiten had received on 7K Cattle Co. When Arnold asked Williams where the cattle would be coming from, Williams said Texas or Kentucky, the Kentucky cattle being the best buy. Arnold ordered the Kentucky cattle and was told to make his check

²Official notice is taken that the complaint filed in this disciplinary proceeding on April 6, 1992, alleged the misuse of funds that were obtained pursuant to a clearing agreement and used to repay James P. Whiten, a livestock dealer from Toccoa, Georgia, a debt incurred for money that had been advanced by Whiten to Arnold for the purchase of livestock.

payable to 7K Cattle Co. (Investigation Exhibit J)

16. The agreement worked out during a number of telephone calls provided for the direct delivery of the heifers ordered to Arnold in Foss, Oklahoma, on Thursday, December 1, 1994, with payment to be made by check that Arnold was to send Williams by Federal Express on Friday, December 2, 1994. Arnold represented to Williams that he was banking in Ashland, Kansas, and Williams contacted the president of the bank and was told that "Arnold was set up at his bank to buy cattle, that there would not be a problem." (Investigation Exhibit I, Williams Declaration) This representation was, in turn, communicated to James P. Gibson, who negotiated the sale of the cattle to Williams and who used this same representation³ to obtain the approval of Mr. Cherry to the sale prior to the shipment of the cattle from Bowling Green, Kentucky, to respondent Arnold in Foss, Oklahoma. Complainant's prior authorization was needed because it was acting as a clearing agency for Gibson. (Complainant's Evidence, Statement of James P. Gibson)

17. The 114 heifers were delivered to respondent Arnold on December 1, 1994. The shipping record that was signed by Arnold upon delivery stated that the 114 head were shipped from "Jim Gibson, Bowling Green, KY." (Complaint attachment)

18. On November 30, 1994, complainant issued its invoice No. 18201 to Williams seeking payment in the amount of \$37,120.61 for 114 heifers with a weight of 50,995 and a price of 73.38. (Complaint attachment)

19. On December 1, respondent Williams issued a 7-K Cattle Company invoice to respondent Arnold seeking payment in the amount of \$37,946.25 for 114 heifers with a weight of

³Gibson's statement places the banker in Foss, OK, rather than in Ashland, KS.

50,595 and a price of 75.00. This invoice contains the printed statement "Title to Livestock remains in 7-K Cattle Co. until all accounts due or to become due have been fully paid."

(Investigation Exhibit G)

20. When Williams did not receive the payment check from Arnold by Federal Express on Saturday, December 3, 1994, he telephoned Arnold and was told by Arnold that the check would be there Monday, that special Saturday delivery had not been requested. When Williams called back on Monday afternoon he was advised that Arnold was not making payment. Williams demanded that Arnold let him come with a truck and pick up the cattle. Arnold told Williams that it was too late as the cattle were already gone on a Whiten truck. The insufficient funds check that Williams had given to James Whiten Livestock in 1993 was returned to him by Federal Express within the next few days. (Investigation Exhibit I)

21. The 114 head of cattle were actually taken to Platt Livestock, Inc. in Platt, Kansas, where they were sold at auction for gross proceeds of \$33,589.18 on December 8, 1994. The market issued two custodial account checks payable to James Whiten in the amounts of \$23,643.84 and \$7,938.60 for net proceeds totaling \$31,582.44. These checks were deposited to respondent James Whiten's personal account. (Investigation Exhibits F, H and K)

22. The formal complaint was received on February 10, 1995, which is within 90 days of accrual of the cause of action alleged therein.

Conclusions

There is substantial evidence that respondent Williams, an unregistered dealer operating subject to the Act, purchased 114 heifers from complainant and failed to pay complainant the agreed purchase price of \$37,120.61. Respondent Williams had agreed to pay complainant after

he received payment from respondent Arnold, the customer to whom the livestock was shipped by complainant's agent and clearee, James P. Gibson. Although respondent Williams has claimed to have entered into the oral contract that he reached with respondent Arnold to sell the 114 heifers for a total price of \$37,946.25 as an agent of complainant, and has asserted that he was to receive a selling commission from complainant for his services, he has failed to provide the necessary evidence to support this claim. The complaint filed by A.W. Cherry & Son alleges that the feeder cattle were sold to Kevin Williams, who had the cattle sold to Pokey Arnold, Foss, Oklahoma. The invoices issued, and the written statement provided by James P. Gibson establish that Williams was not acting as complainant's agent. We recognize that the complaint alleges a \$37,120.61 purchase amount which includes a commission of \$254.97, but the record in this proceeding does not identify who earned this commission. The \$37,946.25 purchase price agreed to by respondent Arnold is \$825.64 higher than the \$37,120.61 figure that was agreed to by respondent Williams, and it appears that the latter figure already includes the costs of delivery to Foss, Oklahoma.⁴ We conclude that there was a dealer mark up of the price that is consistent with the existence of two separate contracts, and that complainant was not an undisclosed principal in the agreement between Williams and Arnold. There is no explanation in the record

⁴The following itemization of the amount claimed appears in the complaint:

Cost of cattle: 114 head at 50,995 lbs.	\$34,243.19
Trucking	1,662.50
Feed	450.00
Commission	254.97
Profit	509.95
Total	\$37,120.61

Respondent Williams admits in his answer that the cattle were "valued at \$34,243.19 to Pokey Arnold" and does not dispute, and, therefore, admits the other amounts claimed.

for the 500 pound lower weight total appearing on the invoice issued by Williams. The difference is not material since recovery is being sought in this proceeding for the lower of the two purchase amounts pursuant to the invoice issued by complainant.

The report of investigation contains a memo establishing that Williams contacted the regional office of Grain Inspection, Packers and Stockyards Administration in Lenexa, Kansas on December 8, 1994. It appears that he inquired about filing a reparation complaint against Arnold and James Whiten, but failed to take such action. The answer that Williams filed in this proceeding on July 10, 1995, alleges that fraudulent mis-representations were made by Arnold on behalf of James Whiten and asks that they be ordered to pay for the 114 head of cattle. This answer was not treated as the filing of a cross claim when received, and if it had been so regarded under the Rules of Practice, it would have been untimely under section 309(a) of the Act as having been asserted more than 90 days after the cause of action accrued. We must examine the merits of the transaction between the respondents, however, in order to determine whether the actions and omissions that Williams claims were fraudulent were, in fact, improper under the Act with respect to Williams, before determining whether they may also be deemed violations for which damages may be awarded to complainant.

It is undisputed that respondent Williams was still indebted to respondent Whiten Livestock in November of 1994 for a livestock purchase made in July of 1993 for which an insufficient funds check in the amount of \$39,943.30 had been issued. The general right to setoff prior debts against current obligations is recognized by the Secretary, and the right to plead a setoff in reparation proceedings under the Act is acknowledged in section 202.106 (c) of the

Rules of Practice.⁵ Whether a setoff will be allowed is a matter of remedy governed by the law of the forum in which the action was brought rather than the law of the place where the obligation sued on was made.⁶ The right of setoff is essentially an equitable right founded on equitable principles, and federal courts will not permit setoff when it would be inequitable or contrary to public policy to do so.⁷ We must decide, therefore, whether the failure to disclose that Arnold was acting as an agent for James Whiten and Whiten Livestock by itself was wrongful, or whether it became wrongful when coupled with the affirmative representation that Arnold would use funds for payment that were available at a specific bank. This representation was relied upon after the availability of funds was confirmed by a telephone call to an unidentified bank official.

There is no general requirement under the Act that a dealer buying livestock disclose to a livestock seller the identity of his principal, or even that he is acting as an agent for an undisclosed principal, before making a purchase. However, if the dealer has reason to believe that the seller would not sell to the principal, then the dealer is failing to disclose a material fact. This could easily justify a rescission of the contract. When such an omission is coupled with an affirmative misrepresentation as to payment, as is the case herein, we conclude that it will constitute an

⁵(c) *Setoff, Counterclaim or cross-claim*. The answer may assert a setoff, counterclaim or cross-claim, or any combination thereof. (9 C.F.R. §202.106(c))

⁶Crane v. United States, 73 Ct. Cl. 677, 55 F.2d 734, cert. denied 287 U.S. 601, 77 L. Ed. 523, 53 S Ct 7.

⁷Federal Deposit Ins. Co. v. Bank of America Nat. Trust and Sav. Ass'n, 701 F.2d 831, 836-37, cert. denied 464 U.S. 935, 78 L. Ed. 2d 310, 104 S. Ct. 343 (1983); Brunswick Corp. v. Clements, 424 F.2d 673 (6th Cir. 1970)(creditor obtaining a debtor's property wrongfully not entitled to setoff), cert. denied, 400 U.S. 1010, 91 S. Ct. 569, 27 L.Ed 2d 623; Lines v. Bank of Amercia Nat. Trust & Sav. Ass'n, 743 F. Supp 176, 182-83 (S.D.N.Y. 1990).

“unjust practice” under section 207 of the Act.

Reparation was awarded in Steven P. Russell II v R.L. Schmidt, DVM et al, 41 Agric. Dec. 1571 (1982), when a market agency was found to have failed to make any effort, directly or indirectly, to disclose that 46 heifers were subject to a probability of infection. Our determination in that proceeding was made upon considering the following from 3 Restatement of Torts 2d:

§551. Liability for Nondisclosure

(1) One who fails to disclose to another a fact that he knows may justifiably induce the other to act or refrain from acting in a business transaction is subject to the same liability to the other as though he had represented the non-existence of the matter that he has failed to disclose, if, but only if, he is under a duty to the other to exercise reasonable care to disclose the matter in question.

(2) One party to a business transaction is under a duty to exercise reasonable care to disclose to the other before the transaction is consummated,

(e) facts basic to the transaction, if he knows that the other is about to enter into it under a mistake as to them, and that the other, because of ...the customs of the trade or other objective circumstances, would reasonably expect a disclosure of those facts.

Nondisclosure was determined to amount to a fraudulent misrepresentation in the above proceeding after official notice was taken that a “custom of the trade” called for disclosure that the animals were subject to a probability of infection.

We find, even exclusive of the affirmative misrepresentation that respondent Arnold made as to payment, that a duty existed in the present proceeding because of certain objective circumstances to exercise reasonable care to disclose that James Whiten was a principal who intended to make payment by setoff of a prior debt. From his own experience with Mr. Williams, James Whiten knew that Williams robbed Peter to pay Paul. When Williams failed to pay Whiten

Livestock in 1993. William's sole excuse was that the proceeds realized from the resale of the livestock were used to pay another livestock seller and that he was not able to pay Whiten Livestock without these proceeds. James Whiten knew that the attorney he had employed to collect the bad check that Williams had issued in 1993 had not been successful. We conclude that as soon as Arnold learned that Williams intended to provide heifers from Kentucky to fill the order that he had placed instead of using his own animals in his feedlot, that Arnold, and the respondents for whom he was acting, would have been under an obligation to at least inquire as to whether Williams had paid for the livestock. Had they made the necessary inquiry and learned that Williams would need the proceeds to pay complainant, a duty of disclosure would have come into existence.

The above analysis would apply whenever an agent entitled to buy and sell livestock for his own account acts for a undisclosed principal with knowledge that the only payment intended is by a setoff of a prior debt. However, respondent Arnold was under a 5 year suspension that only permitted him to purchase livestock as a salaried employee of respondent Whiten Livestock. Accordingly, it was in violation of an order of the Secretary for Arnold to use his name in any livestock transaction instead of the name Whiten Livestock, and it would have been proper for Arnold to buy livestock in the name of Whiten Livestock only if he had been a bona fide salaried employee at the time.

A salaried employee is one whose wages, and commissions if allowed, are reported on a W-2 form. Assuming that respondent James Whiten had actual knowledge that Arnold was under a suspension, he would have been willfully violating section 201.81 of the regulations, a substantive regulation that prohibits the employment of suspended registrants, unless he was

employing Arnold in strict conformity with the limited exception provided in the order. It is extremely unlikely that respondent James Whiten would not have known terms of Secretary's order, since the name Whiten Livestock appears in both the complaint and the decision, and it is evident from the allegations involved that James Whiten would have been personally involved in the investigation as well as the settlement reached.

We have determined that respondents Arnold, James Whiten and Whiten Livestock were responsible for a material misrepresentation and that they failed to make a necessary inquiry that would have revealed the existence of a situation where a disclosure of Arnold's agency was required, an action and an omission that constitute unjust practices in violation of section 207 of the Act. Additionally, we have found that respondent Arnold was acting in violation of an order of the Secretary. For these reasons, it is clear that it would be inequitable to allow the return of William's insufficient funds check to constitute payment by setoff in this fact situation.

It now becomes necessary to decide whether liability for false and misleading misrepresentations extends to all persons injured in consequence of their reliance on such misrepresentations or is limited to the parties to the contract involved. The language of section 308(a) does not limit the right of recovery to the immediate livestock seller or to one having a mortgage on, or a properly filed security interest in the livestock. The terms "any person subject to this Act" and "the person or persons injured thereby" are about as broad as can be stated in any statute. When set forth in an Act that has been held to be remedial legislation that should be liberally construed to further its life and fully effectuate its public purpose,⁸ these terms are

⁸See, Rice v. Wilcox, 630 F.2d 586, 590 (8th Cir. 1980)(our reparation proceeding was Rice v. Wilcox, 34 Agric. Dec. 1651(1975)); Bruhn's Freezer Meats, Inc. v. USDA, 438 F.2d 1332, 1336 (8th Cir. 1971); United States v. Donahue Bros., Inc., 59 F.2d 1019, 1023 (8th Cir.

entitled to a broad construction when there is substantial evidence that an unjust practice has occurred in the marketing of livestock in interstate commerce. We conclude that complainant acted in reliance of a false and misleading misrepresentation, and that it was reasonable for respondent Williams to pass on this misrepresentation and for complainant to ship cattle in reliance on this misrepresentation. Moreover, Williams' purchase from Gibson and A.W. Cherry & Son came about solely to satisfy the order placed by Arnold for the deliberate purpose of obtaining livestock that were to be paid for with a returned NSF check. Complainant, under these circumstances, has suffered an injury for which reparation may be ordered. We need not determine whether respondents Arnold, James Whiten and Whiten Livestock engaged in a deliberate fraudulent misrepresentation as to their intention with respect to making payment, or made a true but incomplete statement as to the existence of funding that was fraudulent because it implied that such funding would be utilized, since these claims were not raised by complainant and the record was not fully developed in response to respondent Williams' assertions. The provision of information on how Arnold was set up to make payment for livestock purchases with no mention of a present intention not to make payment in accordance with this arrangement, however, appears on its face to be the type of fraudulent conduct Section 529 of the Restatement of Torts 2d, addresses:

§529. Representation Misleading Because Incomplete

A representation stating the truth so far as it goes but which the maker knows or believes to be materially misleading because of his failure to state additional or qualifying matter is a fraudulent misrepresentation.

The authority of the Secretary to award reparation against a dealer is found in the part of section 207 that reads "and every unjust, unreasonable, or discriminatory regulation or practice is prohibited and declared to be unlawful."⁹ Respondents Arnold and Whiten Livestock were acting as dealers and should be held jointly and severally liable for the \$37,120.61 that complainant was entitled to receive for the 114 heifers.¹⁰ Since the wrongful actions were taken at the direction of respondent James Whiten, he comes within the definition of "dealer" under the Act¹¹ This is especially true since the livestock were resold at a posted stockyard under his name and the net proceeds were deposited into his personal bank account. Finally, it must be noted that the violations that we have found these three respondents to have committed do not excuse respondent Williams of his liability to complainant under the contract that Williams negotiated with Gibson. Complainant, however, is entitled to recover no more than the full amount of his damages, \$37,120.61 plus interest, and if complainant makes a full recovery from one or more of the respondents, then his right to recovery from any other respondent named in the order will end.

This decision and order is the same as a decision and order issued by the Secretary of Agriculture, being issued pursuant to delegated authority, 7 C.F.R. § 2.35, as authorized by Act

⁹Rice v. Wilcox, *supra*; Hays Livestock Comm'n Co. v. Maly Livestock Comm'n Co., 498 F. 2d 925 (10th Cir. 1974); Vance v. Reed, 495 F. Supp. 852 (M.D. Tenn. 1980). See also Rowse v. Platte Valley Livestock, Inc., 597 F. Supp. 1055 (D. Neb. 1984) and Mid-South Order Buyers v. Platte Valley Livestock, Inc., 210 Nebr. 382, 315 N.W. 2d 2229, 41 Agric. Dec. 48 (1982)(practice may consist of a single transaction).

¹⁰Since the violation is in the nature of a tort instead of a breach of contract, complainant is not required to make an election to proceed against either the agent or the undisclosed principal.

¹¹§301(d) of the Act provides that "The term 'dealer' means any person, not a market agency, engaged in the business of buying or selling in commerce livestock, either on his own account or as the employee or agent of the vendor or purchaser. (7 U.S.C. § 201(d))

of April 4, 1940, 54 Stat. 81, 7 U.S.C. §450c-450g. See also Reorganization Plan No. 2 of 1953, 5 U.S.C., 1982 Ed., app. pg. 1068. It constitutes "an order for the payment of money" within the meaning of Section 309(f) of the Act, 7 U.S.C. §210(f), which provides for enforcement of such an order by court action begun by a complainant.

It is requested that copies of all pleadings filed by any party to any such action be filed with the Hearing Clerk, U.S. Department of Agriculture, Washington, D.C. 20250, for inclusion in the file on this reparation proceeding. It is further requested that, if the construction of the Act, or the jurisdiction to issue this order, becomes an issue in any such action, prompt notice of such fact be given to the Office of the General Counsel, U.S. Department of Agriculture, Washington, D.C. 20250-1400.

On a petition to reopen a hearing, to rehear or reargue a proceeding, or to reconsider an order, see Rule 17 of the Rules of Practice, 9 C.F.R. § 202.117.

On a respondent's right to judicial review of such an order, See Maly Livestock Commission v. Hardin et al., 446 F.2d 4 (8th Cir. 1971); and Fort Scott Sale Co., Inc. v. Hardy, 570 F. Supp. 1144 (D. Kan. 1983).

Order

Within 30 days of the date of this order, respondents Williams, Arnold, James Whiten and Whiten Livestock shall be jointly and severally required pay to complainant the sum of \$37,120.61 together with interest thereon at the rate of 10% per annum from December 2, 1994, until paid.

Copies of this Order shall be served on the parties.

Done at Washington, D.C.

JUN 0 9 1997



JUDICIAL OFFICER
Office of the Secretary